United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2081

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-2081

ROBERT L. SCHWARTZ, RICHARD F. KNAPP, RUDOLPH J. MUELLER, LAWRENCE F. McGIVNEY, SIDNEY J. HELLER, GARBIS G. TAKESSIAN, NORBERT W. DOYLE, STANLEY F. POPEIL, WILLIAM E. LANGE, E. LEE MULLER, ROBERT E. McDONNELL, III and JOHN F. SWAN,

Plaintiffs-Appellants,

-against-

McDONNELL & CO., INCORPORATED, T. MURRAY McDONNELL, MORGAN McDONNELL, EDWARD F. BECKER, FRANK V. DEEGAN, WILLIAM J. CORBETT, RAYMOND J. DOYLE, JR., HUBERT McDONNELL, JR., JOHN J. DELLASSANDRO II, and NEW YORK STOCK EXCHANGE, INC.,

Defendants-Appellees.

APPELLEES' JOINT BRIEF

[The names of counsel appear at the end of the brief.]

To be argued by
Michael J. McAllister, Esq.

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Defendants-Appellees.

APPELLEES' JOINT BRIEF

Statement of the Case

This is an appeal by plaintiffs from an opinion and order of the United States District Court for the Southern District of New York (Hon. Lawrence W. Pierce), entered on July 1, 1974, dismissing the action with prejudice for plaintiffs' failure to prosecute the action, pursuant to F.R.Civ.P. 41(b). The reasons underlying the District Court's order are set forth in its opinion. (236a)

This action was commenced on or about March 17, 1971 against 53 named defendants of whom 42 are alleged to have been Governors of the New York Stock Exchange* (the "Exchange") (121a-122a), the Exchange itself, McDonnell & Co., Inc., in Receivership ("McDonnell & Co."), and various officers and directors of McDonnell & Co.** Plaintiffs are 12 former employees and stockholders of McDonnell & Co. who seek $170,400 with interest as damages arising out of their purchase of McDonnell & Co. stock during the period October 1968 to January 1969. The bases of the claims are alleged violations of the federal securities laws and common law fraud. Each of the defendants has denied the material allegations of the complaint and asserted various affirmative defenses.

Issues Presented

1. Did the District Court abuse its discretion in dismissing the action for failure to prosecute?

2. In its consideration of the dismissal of the action, did the District Court properly evaluate plaintiffs' alleged discovery?

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* By stipulation filed October 29, 1973, the action was discontinued as to the 42 Governors.

** Four of the remaining defendants apparently were never served. (¶3, Affidavit of Russell E. Brooks (122a, 125a, 126a))

The History of the Action

Plaintiffs' statement of the case attempts to obscure the lengthy saga of neglect of prosecution of this action and disrespect for the judicial system and opposing counsel. For this reason it is necessary for defendants to explain in detail the facts described in the opinion of the District Court.

On February 28, 1973, the District Court entered an order dismissing this action, without prejudice and without costs, for failure of plaintiffs' counsel* to appear at the call of a Special Review Calendar on January 30, 1973. (73a) With no apparent haste, on April 3, 1973, plaintiffs' counsel applied to the District Court for an order vacating the dismissal and restoring the action to the Special Review Calendar. (74a) Although notice of the Special Review Calendar

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* The identity of plaintiffs' counsel in this action has become a major mystery. The initial counsel of record for plaintiffs, as indicated on the summons and complaint, was the firm of Kresge & Cohen. In April, 1973, Donald M. Kresge, Esq., who was then associated with the firm of Goldstein, Shames & Hyde, indicated to the District Court that he was attorney for the plaintiffs. Neither the District Court nor counsel for the defendants had received the required notice of substitution (Rule 4(c), General Rules of the District Court for the Southern District of New York). In November 1973, an affidavit in opposition to defendants' motions for partial summary judgment was submitted by Frank R. Greenberg, Esq., who identified himself as "a member of Rabin & Silverman, trial counsel for Donald Kresge, attorney for plaintiffs." To further confuse the story, plaintiffs' brief (at 7) states that subsequent to the first dismissal of the action plaintiffs changed their attorneys to Rabin & Silverman. To date, defendants have yet to receive any required notices of substitution of counsel.

had been sent to plaintiffs' counsel of record and the Calendar of January 30, 1973 was published in the New York Law Journal on four separate dates* , plaintiffs' counsel claimed that he "never received any form of notice that this case was on a Special Review Calendar .... " (Affidavit of Donald M. Kresge (76a)) His lack of information regarding the status of the action was not surprising since the sole step in prosecuting this action, which had been on the docket for two years, had been reviewing documents produced in the spring of 1972.

By order filed July 19, 1973, the District Court granted plaintiffs' motion and vacated the dismissal order. (170a) In so doing, the District Court found that plaintiffs' counsel had been guilty of "inexcusable neglect" in prosecuting the action and imposed the costs and attorneys' fees of the motion against plaintiffs' counsel personally. (Ibid.) Moreover, the case was referred to Magistrate Harold J. Raby,

> " ... for the preparation of a rigid schedule, setting forth the dates by which the parties are to complete all discovery, and for the preparation of a pre-trial order ... It is recommended that no further adjournments or deviations from the prepared schedule be permitted to the plaintiffs, except for extreme good cause shown." (Ibid.)

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* January 15 (p. 15), 26 (p. 14), 29 (p. 16) and 30 (p. 14). (¶3, Affidavit of Michael J. McAllister (134a-135a))

The July 19, 1973 order of the District Court unequivocally placed plaintiffs and their counsel on notice that if the action was not going to be prosecuted vigorously -- and in strict accordance with the orders of the Court -- the action would be dismissed again.

On November 18, 1973 Magistrate Raby held a pretrial conference to establish a discovery schedule and to hear defendants' applications for counsel fees and costs incurred in opposing the initial motion to vacate the dismissal. At that conference, plaintiffs' counsel indicated that they wished to take several depositions and that they would complete their discovery program within several months. (Plaintiffs' Objections to Magistrate's Report, dated May 28, 1974 (204a)) Pursuant to the discovery plan discussed at the conference, Magistrate Raby granted plaintiffs six months to complete discovery and directed counsel to appear at a pretrial conference on May 17, 1974. Magistrate Raby's verbal directive to counsel was embodied in a Report to Judge Pierce filed on November 21, 1973:

> "I should also state on the record that, pursuant to the directive of Judge Stewart, I directed that all plaintiffs' discovery be completed not later than six months from the date hereof, and that defendants' discovery be completed not later than September 1, 1974. I further directed that counsel appear at a conference at my office on May 17, 1974 for a report on the progress of discovery." (180a)

In late 1973, defendants moved for partial summary judgment dismissing four counts of the complaint on the ground that they are barred by the applicable statutes of limitations.

On May 17, 1974 plaintiffs' counsel failed to appear at the scheduled conference before Magistrate Raby. Furthermore, plaintiffs' counsel had not embarked upon any of the promised discovery within the six month limit. Thereupon, Magistrate Raby recommended dismissal of the action for failure of plaintiffs' counsel to adhere to the discovery schedule and for failure to appear at the May 17, 1974 pretrial conference. (175a-180a) The opinion and order appealed from followed the Magistrate's recommendation. Defendants' motions for summary judgment were subsequently dismissed as moot.

Discovery Proceedings in This Action

In the early spring of 1972, plaintiffs' counsel reviewed documents produced by McDonnell and Co. and the Exchange.

At the November 18, 1973 conference before Magistrate Raby, plaintiffs' counsel indicated that they wished to conduct several depositions in order to complete plaintiffs' discovery program. (204a) Although plaintiffs never embarked upon the discovery program which had been outlined at the November

18, 1973 conference, plaintiffs now contend that discovery has been completed and that they have complied with the District Court's discovery deadline. Plaintiffs' claim that they have completed their discovery program -- without having conducted any additional discovery at all -- since now they have available to them transcripts of depositions in a consolidated action pending in the Southern District.* It must be noted that the majority of the depositions in that consolidated action were conducted by the firm of Davis and Cox in the spring and summer of 1973 -- well in advance of the November 18, 1973 conference and while plaintiffs' motion to vacate the dismissal order entered February 28, 1973 was sub judice. The defendants, other than the Exchange and McDonnell and Co., never received notice of the depositions (239a), and counsel for the plaintiffs never attended any depositions in the Murphy and McDonnell actions.

Plaintiffs also contend that they had no need to schedule or participate in any deposition discovery in the

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* Margaret Mary McDonnell Murphy v. McDonnell & Co., Incorporated, et al., S.D.N.Y. ,71 Civ. 461 (R.O.), and Anna M. McDonnell, et al. v. New York Stock Exchange, et al., S.D.N.Y. ,71 Civ. 1940 (R.O.). McDonnell & Co. and the Exchange are the only defendants in this action who are also defendants in the Murphy and McDonnell actions. The Exchange also sought to consolidate this action with the other two, but plaintiffs here successfully opposed it, citing the differences among the three actions. (¶¶7-9, Affidavit of Michael J. McAllister (199a))

action because of a stipulation entered into between plaintiffs here, plaintiffs in Murphy and McDonnell, and the defendants common to the three actions -- McDonnell & Co. and the Exchange.(35a-37a) In relevant part, the stipulation provides:

> "3. Notices of depositions served in any of the above captioned actions upon any defendant common to all three of the above-captioned actions pursuant to Fed. R. Civ. P. 30 shall be served upon each of the undersigned." (36a)

By its very terms the stipulation applied only to the defendants common to the three actions. In view of the lack of notice and non-participation in these depositions by defendants, other than the Exchange and McDonnell & Co., the use of these depositions in this action is questionable. This problem is not cured by the stipulation.

Clearly then, plaintiffs' failure to attend a call of the Special Review Calendar and a pretrial conference, both duly noticed, and to take discovery pursuant to the District Court's schedule justified a second order of dismissal of this action.

ARGUMENT

I

The District Court Did Not Abuse Its Discretion in Dismissing the Action for Failure to Prosecute.

Rule 41(b) of the Federal Rules of Civil Procedure authorizes the dismissal of an action "for failure of the plaintiff to prosecute ... " The Supreme Court, in Link v. Wabash R. Co., 370 U. S. 626, 629-30 (1962), explained the purpose of the Rule:

> "The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts. The power is of ancient origin, having its roots in judgments of nonsuit and non prosequitor entered at common law ... and dismissals for want of prosecution of bills in equity ... It has been expressly recognized in Federal Rule of Civil Procedure 41(b) ... "

The Supreme Court then stated that whether an order of dismissal for failure to prosecute "can stand on appeal depends ... on whether it was within the permissible range of the court's discretion (footnote omitted)." 370 U.S. at 633.

The rule was succinctly stated by this Court,

> "[t]he District Court has the power to dismiss for failure to prosecute, on its own motion. The matter is discretionary, and on appeal from such an order, an appellate court

> will not reverse except for an abuse of discretion, Link v. Wabash R. Co., 370 U. S. 626, 82 S.Ct. 1386, 8 L. Ed 2d 734 (1962); Deep South Oil Co. of Tex. v. Metropolitan Life Ins. Co., 310 F.2d 933 (2 Cir. 1962); Rule 41(b)." West v. Gilbert, 361 F.2d 314 (2d Cir. 1966), cert. denied, 385 U.S. 919 (1966); accord, Theilman v. Rutland Hospital, Inc., 455 F.2d 853 (2d Cir. 1972)

Thus, the only question which must be addressed by this Court is: did the District Court abuse its discretion in dismissing the action? We submit that plaintiffs' complete lack of diligence provides a sound and proper basis, well within the District Court's discretion, for dismissal.

Plaintiffs were forewarned by the first dismissal order of the District Court's concern with the slow progress of the case and counsel's failure to make the minimal effort necessary to keep track of the case. Yet, thereafter, counsel again failed to attend a pretrial conference due to inadvertence, rather than inability. Moreover, on several occasions, plaintiffs represented to the District Court their need to take several depositions. Nevertheless, when faced with the charge that they had failed to take the depositions, plaintiffs reversed their position and contended that all discovery was completed. The District Court realized that this change in position merely was "conjured up after the fact to excuse yet another failure to actively pursue this litigation." (239a-240a) Clearly, the District Court's patience was exhausted by the absence of activity on plaintiffs' part. Under such circumstances, its order of dismissal was proper.

It should be noted that in its memorandum endorsement vacating the first dismissal order (170a), the District Court followed the suggestion of Schwarz v. United States, 384 F.2d 833 (2d Cir. 1967) that attorneys' fees be imposed, thereby hopefully curing for the future the neglect of counsel. Needless to say, the "less drastic" action of the District Court was insufficient to obtain plaintiffs' minimal compliance with the Court's schedule.

Plaintiffs also contend that lack of prosecution must arise out of willful behavior. In Theodoropoulos v. Thompson-Starrett Co., Inc., 418 F.2d 350 (2d Cir. 1969), cert. denied, 398 U.S.905 (1970), this Court considered and rejected that proposition. There, counsel on two occasions had failed through inadvertence to file a note of issue within a time set by the District Court. This Court affirmed dismissal under Rule 41(b) and stated:

> "the second lapse on the part of plaintiffs' counsel was hardly 'less blameworthy' than the breach which caused the initial dismissal. Instead, it was a second and similarly inexcusable failure to comply with an order to move a case toward trial promptly. First the appellants' attorneys forgot or ignored the terms of their own stipulation, and then they lost track of the fact that their motion to vacate the dismissal had been granted. Whether this represented calculated dilatoriness or mere carelessness, dismissal under F.R.Civ.P. 41(b) was proper," citing Link, supra. (emphasis added) Id. at 354.

The cases relied upon by plaintiffs are inapposite. Cf. Weldon v. Grace Line, Inc., 404 F.2d 76 (2d Cir. 1968) (plaintiffs' counsels' failure to appear at a pretrial conference resulted from a good faith misunderstanding between attorneys); Peterson v. Term Taxi Inc., 429 F.2d 888 (2d Cir. 1970) (plaintiff himself temporarily detained by understandable circumstances from appearing at the hour set for trial); Korn v. Franchard Corporation, 456 F.2d 1206 (2d Cir. 1972) (circumstances had changed between the ruling below and the decision on appeal compelling remand to allow the District Court to review the changed circumstances); Flaks v. Koegel, Docket No. 74-1437 (2d Cir. filed September 25, 1974) (default judgment of $919,147.50 without a hearing on damages arising from defendants' failure to make discovery available); Syracuse Broadcasting Corp. v. Newhouse, 271 F.2d 910 (2d Cir. 1959) (erroneous reliance on F.R. Civ. P.16 where District Court held that plaintiffs' failed to clarify factual issues).

Plaintiffs attempt to minimize the cumulative weight of their negligence by alleging that a change of counsel occurred subsequent to the first dismissal of the action. Plaintiffs attribute the first failure to attend a call of the Special Review Calendar to Mr. Kresge and the second failure to attend a scheduled pretrial conference to Rabin & Silverman. As noted above, while there is some mystery as to who represents plaintiffs, one thing is clear -- as a matter of record -- Mr.

Kresge is still the attorney responsible to the Court, the plaintiffs and other counsel; at the very most, Rabin & Silverman may be trial counsel. There has been no change in counsel as envisioned by General Rule 4(c) for the United States District Courts for the Southern and Eastern Districts of New York. Accordingly, there has been no change in responsibility and all failures are attributable to one counsel.

In conclusion, the failure to attend two pretrial conferences causing inconvenience to opposing counsel and to a "vastly overburdened" District Court, together with the failure to complete discovery, all over a period of time, constitute a pattern indicating "little, if any, serious intention to prosecute the action". (242(a)) Clearly, the facts more than support the District Court's exercise of its discretion to dismiss the action. (242(a))

POINT II

The District Court Properly Found Plaintiffs' Failure To Pursue Discovery To Be An Element Of A Pattern Of Plaintiffs' Consistent Failure To Prosecute Which Justified Dismissal Of This Action.

Plaintiffs also seek to divert the attention of the Court from their failure to prosecute this action by erroneously characterizing (Br.19) the dismissal below as having been based, in part, "on the proposition that discovery materials and testimony obtained in the other proceedings, involving the same issues, were inadmissible at the trial".

Aside from the serious doubts as to whether those depositions are admissible in this action, the opinion and order of dismissal rests, not on the "proposition" that such discovery materials were inadmissible in this action, but rather, as in Sheaffer v. Warehouse Employer Union, 408 F.2d 204 (D.C. Cir.), cert. denied, 395 U.S. 934 (1969), on the repeated and inexcusable "violations of...local court rules and pretrial orders and a complete lack of diligence in bringing the case to trial". 408 F.2d at 205. Furthermore, even if, as plaintiffs claim, substantial documentary discovery took place in this action, that fact would not suffice to support a vacation of the dismissal order. West v. Gilbert, 361 F.2d 314 (2d Cir. 1966), cert. denied, 385 U.S. 919 (1966). In West substantial discovery had taken place, "including

'1000 pages of deposition' and 'hundreds of documents marked for identification'." 361 F.2d at 315, 316. Nevertheless, this Court upheld the District Court in its dismissal of the action for lack of prosecution.

The District Court correctly noted that a decision to waive discovery is usually:

> "...counsel's to make, and the Court would not second-guess him, or permit opposing counsel to do so. It is brought into question here, only because in the total context of this action it has the appearance of being conjured up after the fact to excuse yet another failure to actively pursue this litigation." (239a-240a)

It was in this "total context" that the District Court found that: the Magistrate, on November 21, 1973, upon plaintiffs' request for an opportunity to take further discovery of certain defendants, had established a strict schedule requiring plaintiffs discovery to be completed by May 17, 1974; the depositions which plaintiffs required in November had not even been commenced by the following May; and plaintiffs determined that they would be satisfied to utilize discovery obtained in other actions only after the Magistrate recommended dismissal for failure to prosecute.

The District Court further found that it "defied reason" for plaintiffs to argue "alternatively" that they had not proceeded with discovery because of the pendency of certain motions for partial summary judgment. Those motions, the Court correctly observed, were addressed to only four of the eleven

counts in the complaint, while all counts involved "essentially the same facts." The Court further found that if plaintiffs' counsel believed that the pendency of the partial summary judgment motions might affect the discovery schedule, counsel should have ascertained the Magistrate's view on that question, and that his failure to do so contributes to the appearance of counsel's arguments as an "after the fact" attempt "to excuse yet another failure to actively pursue this litigation." (240a) It was in this context that plaintiffs' newly found argument that they require no discovery at all appeared to the District Court to be merely an excuse.

Notwithstanding plaintiffs' contentions, the availability of the depositions in the other actions for use in this action is highly doubtful. The stipulation of joint discovery upon which plaintiffs rely (35a-39a), was limited by its terms to the two defendants who were common to all three of the actions, the Exchange and McDonnell & Co.

Since the stipulation does not permit the use of those depositions against the remaining defendants, plaintiffs, if they are to use those depositions, must find another avenue of admissibility. They claim to find such an avenue in Rule 32(a) of the Federal Rules of Civil Procedure, which provides, in pertinent part:

> "when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor."

First of all, this Court can take judicial notice of the fact that the deposition transcripts in the consolidated actions have not to this date been "duly filed", and there is no assurance that they ever will be. Therefore, the transcripts could not be utilized in this action.

Plaintiffs argue that Rule 32(a) has been liberally construed in that the courts have not universally required dismissal of the prior action and identity of parties as a prerequisite to the use of the depositions taken in the prior action. But even the most "liberal" decisions have required a substantial identity of issues which, in the absence of an identity of parties, provided in the prior action an adversarial interest in cross-examination equivalent to the interest of the parties against whom the depositions are sought to be introduced in the later action. 4A Moore's Federal Practice, ¶¶32.02, 32.08; 8 Wright & Miller, Federal Practice & Procedure, § 2150 at 468-9; Ikerd v. Lapworth, 435 F.2d 197 (7th Cir. 1970). Moreover, in three of the four cases cited by plaintiffs in support of their contention that the use of the depositions taken in the other actions in this case would be proper despite

a lack of identity of the parties, the parties were in fact identical. See Weyerhauser Co. v. Gershman, 324 F.2d 163 (2d Cir. 1963); Batelli v. Kagan & Gaines Co., 236 F.2d 167 (9th Cir. 1956); Franzen v. E. I. duPont de Nemours & Co., 146 F.2d 837 (3rd Cir. 1944).

In this case where there is no substantial identity of parties; where the individual officers and directors of McDonnell & Co. were not defendants in the actions in which the depositions were taken and had no opportunity to cross-examine; and where there were no participants in those depositions with an adversarial interest in cross-examination comparable to the interests of the individual defendants herein; and where plaintiffs themselves urged at a prior juncture in this litigation that there is little or no overlap of issues, it is clear that plaintiffs cannot satisfy even the most liberal reading of Rule 32(a).*

Faced with the limitations imposed by their own stipulation and Rule 32(a), plaintiffs finally argue that Rule 32(a) can simply be ignored by suggesting that the depositions are admissible as exceptions to the hearsay rule.

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* Plaintiffs also state (Br.12) that they intend to use testimony taken in the Cohig arbitration. Aside from the fact that the admissibility in a federal court of testimony taken in a non-judicial proceeding in which no rules of evidence are adhered to is highly questionable, it is worth noting that the claimants' case was dismissed as to the individual respondents, some of whom are defendants here.

Plaintiffs conveniently overlook the obvious fact that before hearsay objections and exceptions can properly be considered, depositions must be otherwise admissible under Rule 32(a). Furthermore, irrelevant as plaintiffs' reference to the proposed Federal Rules of Evidence may be, it is clear that those rules would not help them here. Proposed Rule 8-04 still would require that the deposition sought to be used in the subsequent proceeding has been taken

> "at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered."

Only two of the parties herein were parties to the actions in which the depositions were taken and none of the individual defendants herein were parties to those actions. Moreover, there were no parties to the other actions with interests in cross-examination similar to the interests of the individual defendants herein. Clearly, then the requisite similarity of motive or interest under Proposed Rule 8-04 would be lacking in this case.

Therefore, the District Court properly viewed as sham the "magical" finding of plaintiffs' counsel that their discovery was complete and correctly considered plaintiffs' failure to take discovery as another element of their failure to prosecute.

CONCLUSION

The facts show that the order of the District Court was well within its discretion and should be affirmed.

Dated: New York, New York
November 18, 1974

Respectfully submitted,

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AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Edna Winston being duly sworn, says: that I am over the age of eighteen years and am not a party herein, and that on the 18th day of November, 19 74, I served a true copy of the within

Joint Appellee's Brief

upon the attorneys hereinafter named at the places hereinafter stated and set opposite their respective names by depositing the same, properly enclosed in a post-paid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department at 20 Exchange Place within the City and State of New York, directed to said attorneys at their respective addresses given below, which were designated by them for that purpose upon the preceding papers in this action, to wit:

Name	Address	Attorney for
Proskauer, Rose, Goetz & Mendelsohn	300 Park Avenue New York, N. Y. 10022	Appellee McDonnell & Co.,Inc.

Rabin & Silverman

80 Broad Street
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10004

Appellant

Edna Winston

Sworn to before me this
18th day of November, 1974.

Notary Public
MICHAEL J. McALLISTER
Notary Public, State of New York
No. 31-7703035
Qualified in [illegible] County
Commission Expires March 30, 1976

21A